No. 78287-3

SUPREME COURT
OF THE STATE OF WASHINGTON

PLANET EARTH FOUNDATION, JOHN KEITH BLUME, JR. and LISA BLUME,

Petitioners

v.

GULF UNDERWRITERS INSURANCE COMPANY, and AMERICAN BUSINESS & PERSONAL INSURANCE, INC.,

Respondents.

RESPONDENT GULF UNDERWRITERS INSURANCE COMPANY'S SUPPLEMENTAL BRIEF RE DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Planet Earth is attempting to convince this Court that it should be allowed to obtain benefits under a Directors and Officers policy[1] for claims brought by NYU arising from media services that Planet Earth agreed to provide to NYU. The policy, however, expressly stated that Gulf would not be providing coverage for any claim that arose out of Planet Earth rendering, or failure to render, professional services. Because all of NYU's claims against Planet Earth arose from the professional services that Planet Earth provided, or was supposed to provide, to NYU, the policy precluded coverage and Gulf was not under a duty to defend Planet Earth.[2]

I.
PLANET EARTH WAS IN THE BUSINESS OF PROVIDING PROFESSIONAL MEDIA SERVICES.

In all likelihood, the only time that Planet Earth has ever claimed that its media productions were not of a professional nature is in this dispute. In its own marketing materials, it touted the professional nature of its work and the expertise and skill needed to produce such media programs. In NYU's complaint, NYU alleged that Planet Earth solicited

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[1] The formal name of the policy was a "Non-Profit Management and Organization Liability Insurance Policy." (C.P. 607.) However, the common name of the policy was a Directors & Officers liability policy and this is how Jim Miller, Planet Earth's insurance agent, presented the policy to Planet Earth: "Please find enclosed your Confirmation of Coverage for your Directors & Officers policy." (C.P. 885.)

[2] Gulf has previously set forth the factual background in its Response to Petition for Discretionary Review. This supplemental brief will provide additional case authority for the analysis provided in the Response to Petition for Discretionary Review and Gulf's brief filed in the court of appeals.

its business by stressing its expertise in media productions. Planet Earth has admitted in its appellate briefs that NYU hired it for its skills in producing advertisements. Under well-settled case law, when Planet Earth's media services were "professional services."

Planet Earth argued below, and is arguing to this Court, that the term "professional services" is ambiguous and was improperly defined by the trial court. The trial court, however, applied the same definition of "professional services" as has been consistently used by the courts. Moreover, virtually any definition of "professional services" would encompass the media services that Planet Earth provided to NYU.[3]

A. In essence, the term "professional services" encompasses services that involve special training, knowledge, and skill.

Courts have been defining the term "professional services" in insurance policies for at least forty years and have consistently held that the term encompasses services that involve special training, knowledge and skill.

In *National Ben Franklin Ins. v. Calumet Testing Services, Inc.*, 60 F. Supp.2d 837 (N.D. Ind. 1998), *aff'd.*, 191 F.3d 456 (7th Cir. 1999), the court, applying Indiana law, addressed the issue of whether an insured had coverage under a commercial general liability policy for injuries arising

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[3] Planet Earth suggested a definition of "professional services" that would not exclude coverage. For the reasons set forth at page 17 of Gulf's Response to Petition for Review, Planet Earth's proffered definition is flawed for multiple reasons.

out its technician's testing errors. The policy contained a clause excluding from coverage acts committed by the insured "in rendering or failing to render service or advice of a professional nature." *Id.* at 840. As here, there was no definition of the term "professional services" in the policy. As here, the insured was arguing that the term was ambiguous and that the exclusion did not apply.

The court noted that there is no requirement that every term in an insurance policy be defined and that an ambiguity does not arise simply because a controversy exists between the parties:

> There is no rule of construction that every term in an insurance contract must be defined, and the mere fact that a term is not defined does not render it ambiguous. ... An ambiguity does not exist simply because a controversy exists between the parties, with each favoring a different interpretation.

Id. at 841.

The court held that the term was not ambiguous. *Id.* at 842. *Accord, Multnomah County v. Oregon Automobile Ins.*, 256 Or. 24, 29, 470 P.2d 147 (1970)(exclusionary clause of no coverage for "injury, sickness, disease, death or destruction due to the rendering of or Failure to render any professional service" is "plain and unambiguous").

The court then defined the term "professional services" in the same manner as numerous other jurisdictions had been doing for insurance policy purposes since 1968.

> The most often-quoted definition of "professional service" is found in the case of *Marx v. Hartford Acc. & Indem. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968):
>
> A 'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.

Id. at 844.

The court rejected the argument that specialized professional training is needed before a service will be deemed a professional service:

> For the exclusion to apply, the activity need not be one for which the traditional professional training, e.g., doctor, lawyer or engineer, is required.

Accord State Street Bank and Trust Co. v. INA Ins. Co. of Illinois, 207 Ill.App.3d, 961, 567 N.E.2d 42, 47, *app. denied*, 139 Ill.2d 605, 575 N.E.2d 924 (1991); *Aker v. Sabatier*, 200 So.2d 94, 97 (La. App.), *appeal denied,* 251 La. 48, 202 So.2d 657 (1967); *Harad v. Aetna Casualty and Surety Co.*, 839 F.2d 979 (3rd Cir. 1988)(applying Pennsylvania law); *American Motorist Ins. v Southern Sec. Life Ins.*, 80 F. Supp.2d 1285

(M.D. Ala. 2000)(applying Florida law); *Western World Ins. v. American and Foreign Ins.*, 180 F. Supp.2d 224 (D. Me. 2002)(applying Maine law).

B. Courts have held that a wide-variety of services fall within the scope of the term, "professional services."

Using the well-accepted definition of "professional services" as including acts arising out of a vocation, calling, occupation, or specialized knowledge, courts have held that numerous activities fall within the scope of that term.

In *Hollingsworth v. Commercial Union Ins.*, 208 Cal. App.3d 800, 807, 256 Cal. Rptr. 357 (1989), a customer sued a cosmetics store for damages allegedly caused by the store's employee negligently piercing the customer's ear. The store tendered the defense to its business insurer. The insurer denied coverage under the policy's professional services exclusion. The store argued that ear piercing was not a professional service because it required no special training or skill. The store pointed out that the employees were paid compensation of $4.00 to $4.50 an hour and were not required to have a high school education or any other specialized knowledge. The employee had only a twenty-minute demonstration of the piercing tool by the manufacturer's representative.

The court, applying the *Marx* definition of professional services, held that in the context of a cosmetics business, "ear piercing clearly constitutes a professional service." *Id.* at 808. "Thus, the ear-piercing was

a 'professional' service both in the sense that it constituted an aspect of the cosmetics sales profession and that it was done for and in anticipation of some form of financial gain." *Id.* at 809.

In *Amex Assurance Co. v. Allstate Ins.*, 112 Cal. App.4th 1246, 5 Cal. Rptr.3d 744 (2004), a plumber with homeowner's insurance installed a propone water heater at his friend's house. He allegedly installed it improperly and the improper installation caused a fire that destroyed the house. The plumber's assignee, Amex, sought coverage under the plumber's homeowner's insurance policy that excluded professional services.

Amex argued that the exclusionary clause did not apply because plumbing is a craft or trade and did not qualify as a professional service.

The California court of appeals rejected this argument. The court, citing *Hollingsworth,* 208 Cal. App.3d at 800, noted that the term "professional services" is not limited to learned professions but instead "generally signifies an activity done for remuneration as distinguished from a mere pastime." *Id.* at 1252. *See also Terre Haute First National Bank v. Pacific Employers Ins.*, 634 N.E.2d 1336 (Ind. App. 1993)(bank providing guardianship services); *Multnomah County v. Oregon Automobile Ins.*, 256 Or. 24, 470 P.2d 147 (1970)(medical technician not providing insulin to a jail inmate); *Knorr v. Commercial Cas. Ins.*, 171 Pa. Super. 488, 90 A.2d 387 (1952)(beautician allowing hair-dryer to fall on

customer's head); *Brosnahan Builders, Inc. v. Harleysville Mutual Ins.*, 137 F. Supp.2d 517 (D. Del. 2001), *aff'd.*, 2003 WL 146486 (3rd Cir.), *cert. den.*, 540 U.S. 820 (2003)(general contractor overseeing construction of house); *Bohreer v. Erie Ins. Group*, 475 F. Supp.2d 578 (E.D. Va. 2007)(crematorium employees mishandling human remains); *Duncanville Diagnostic Center, Inc. v. Atlantic Lloyd's Ins.*, 875 S.W.2d 788 (Tex. App. 1994)(radiological technicians improperly preparing sedative); *American Motorist Ins. Co. v Southern Sec. Life. Ins.*, 80 F. Supp.2d 1285 (M.D. Ala. 2000)(agents selling life insurance policies).

C. The media services that Planet Earth provided to its clients involved special expertise and experience.

Planet Earth's business was providing media services to its clients. Providing media services for others requires a specialized skill that takes training and experience. Planet Earth itself touted those qualities in its marketing materials.

> Planet Earth Media provides a unique contribution by making our expertise available for socially beneficial messages at a cost far below the real market value of creating world-class advertising and communications – often a real market cost of many millions of dollars. And world-class materials are required in the twenty-first century, to achieve free airtime, or to impact the audience with paid time, or through other mechanisms. ... And lastly, even when paid for, communicating social

> issue concerns is an expertise which requires years of full-time experience. ...
>
> At the same time, at even greatly reduced rates, substantial costs are involved and organizations need to know that their resources will be well utilized. The Foundation's records and expertise guarantee such an outcome.

C.P. 549 (emphasis added).

Planet Earth admitted in the brief it filed in the court of appeals that NYU hired it for its media skills.

> Here, Planet Earth was hired for its skills in developing public service advertising content for NYU.

(Appellant's brief at p. 19.)

> Its [Planet Earth's] clients hire Planet Earth for the creative abilities of its founders and principals, Keith Blume and Lisa Blume.

(Appellant's brief at 2.)

NYU's allegations in its complaint against Planet Earth clearly stated that Planet Earth was to provide specialized services. In its first amended complaint, NYU alleged:

> 16. During the March 11, 2002 call, Lisa Blume expounded on her superior knowledge and expertise in the area of public service advertising.
>
> 17. [I]n April 2002, Lisa Blume delivered to Collier a videotape and other materials that Lisa Blume said comprised examples of the original print and television

> spots that Planet Earth had created for prior clients. Lisa Blume falsely and intentionally represented that the work Planet Earth would undertake for NYU would be of similar quality to the marketing materials. Those materials included what appeared to be high-quality, originally scripted and filmed television commercials with professional actors, as well as originally produced print advertisements with professional models.
>
> ...
>
> 20. Lisa Blume and Planet Earth represented that Planet Earth had special expertise and success in creating public service campaigns for charitable organizations and achieving effective placement of charitable messages in the media.

(C.P. 687-690.)

The media services to create public-service advertising was not cheap: NYU paid $750,000 to Planet Earth for the promised media campaign.

Creating a media campaign for both print and television requires specialized skill, training, and knowledge. Planet Earth does not dispute that fact. The media services that Planet Earth rendered, or failed to render, to NYU were professional services.

II.
ALL OF NYU'S CLAIMS AGAINST PLANET EARTH AROSE FROM THE PROFESSIONAL SERVICES PLANET EARTH AGREED TO PROVIDE TO NYU.

Planet Earth is arguing that NYU's claims of trademark infringement and unfair competition are somehow different than NYU's other allegations and that those claims do not fall within the professional services exclusion:

> Here, it is critically important that NYU's allegations of trademark infringement and unfair competition are distinct from the other allegations in that their existence did not logically depend on the contractual relationship between Planet Earth and NYU. Planet Earth could have misappropriated NYU's trademark after having become aware of it from all manner of public sources: the World Wide Web, NYU media campaigns, and the like. Gulf's professional-services exclusion applies only to: "an actual or alleged act, error or omission by any Insured with respect to the rendering of, or failure to render professional services for any party."

(Planet Earth's Petition for Discretionary Review at 12, emphasis in original.)

Planet Earth fails to recognize that the exclusionary clause is broader than what it cites above. Instead, the exclusionary clause includes any claim made against Planet Earth "arising out of" it rendering professional services for any party:

> In consideration of the payment of premium, it is hereby understood and agreed that the Insurer shall not be liable to make any payment for Loss in connection with any Claim made against any of the insureds for, based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged act, error or omission by any Insured with respect to the rendering of, or failure to render professional services for any party.

(C.P. 617.)

All of NYU's claims against Planet Earth were "based upon, arising out of, directly or indirectly resulting from, in consequence of" the professional services that Planet Earth provided to NYU.

The term "arising out of" is a broad term and has a broader meaning than the terms "caused by" or "resulted from."

In *Stouffer & Knight v. Continental Casualty Co.*, 96 Wn. App. 741, 982 P.2d 105 (1999), *rev. den.*, 139 Wn.2d 1018 (2000), the insured attorney's secretary embezzled funds from a client. The insured submitted a claim under his errors and omissions professional insurance policy. The policy excluded coverage for claims "arising out of" the dishonest, fraudulent, criminal acts of employees. *Id.* at 745. The insured made numerous arguments as to why the exclusion did not apply. One of his arguments was that the client brought a claim for negligently failing to supervise and that this claim was not a dishonest, fraudulent, or criminal act. The court rejected this argument.

> As CNA notes, the "arising out of" language is construed broadly: "The phrase 'arising out of' is unambiguous and has a broader meaning than 'caused by' or 'resulted from.' It is ordinarily understood to mean 'originating from', 'having its origin in', 'growing out of' or 'flowing from.'" [Citation omitted.] ... Here, Knight's reimbursement to the Woodhams', for which he now seeks coverage from CNA, clearly arose out of Lachelt's dishonest/criminal act. That the reimbursement also arguably arose out of his own negligent failure to supervise Lachelt does not change the fact that the exclusionary clause precludes coverage.

Id. at 750, n. 11.

In *Trumpeter Developments, LLC v. Pierce County*, 272 Wis.2d 829, 681 N.W.2d 269 (2004) the insured county was sued for not approving a plat map because the owner refused to dedicate a portion of the land for parks. Its insurance policy excluded claims "arising out of or in any way connected with any operation of the principles of eminent domain, condemnation proceedings, or inverse condemnation, by whatever name called." *Id.* at 833. The county argued that the complaint did not allege claims arising out of the principles of eminent domain, condemnation proceedings or inverse condemnation. The court noted that it examines the incident giving rise to the claim and not the liability theory. *Id.*

The court rejected the county's position and held that the exclusion applied even though the property owner did not allege condemnation. The

court held that the county attempted to restrict the land owner's use of its land and that a claim based upon a temporary taking was in essence based upon a condemnation claim.

The county also argued that the complaint alleged more than a taking – that it alleged loss of the use of property, slander of title, and interference with marketing of the property, as well as discrimination and violation of civil rights. The court rejected this argument as well holding, "as we have noted, we must look at the incident giving rise to Trumpeter's claim, not the theory of liability asserted." *Id.* at 835.

In *Davis v. Farmers Ins. Group*, 134 Cal. App.4th 100, 35 Cal. Rptr.3d 738 (2005), the seller/builder of a house was sued by the buyer for negligent construction and failing to inform the buyers of the improper construction and design. The seller tendered the defense of the claim to its insurer. The insurer refused the tender on the basis that the policy excluded damages "arising out of" the sale or transfer of real property, including known and unknown property defects. The seller contended that the exclusion did not apply because the buyer was alleging negligent construction and thus by definition the construction took place before the transfer of the property. The court rejected this argument because the buyer's claims arose from the transfer of the property and thus fell within the exclusionary clause:

> Read as a whole, the arising out of the sale exclusion provision that after real property is sold or transferred, claims for bodily injury or property damage resulting from certain known or unknown defects in the real property are not covered. Here, the injuries that the Engebretsens allegedly suffered, for which the Davises sought coverage, arose out of known or unknown defects in the real property after the sale of the real property. Thus, the exclusion was drafted to encompass the very type of claims alleged against the Davises.

Id. at 107.

This same analysis has been consistently used by courts in the context of an insured attempting to obtain coverage in the face of a clause excluding such coverage. *See, e.g., Hingham Mutual Fire Ins. v. Smith*, 69 Mass. App. Ct. 1, 865 N.E.2d 1168 (2007)(homeowner's policy excluding claims "arising out of" sexual molestation applied to negligent supervision claims against parents of child where child sexually molested another child); *Prudential Property & Casualty Ins. v. Brenner*, 350 N.J. Super. 316, 795 A.2d 286 (2002)(homeowner's policy excluding claims "arising out of" the use or possession of controlled dangerous substances applied to wrongful death claim arising out of murder committed during theft of marijuana); *Ohio Casualty Ins. v. Continental Casualty Co.*, 279 F. Supp.2d 1281 (S.D. Fla. 2003)(applying Florida law)(insurance policy excluding injuries "arising out of" the ownership of any auto owned or

operated to any insured applied to claim of negligent maintenance of roadway).

Planet Earth makes an argument that was rejected in *Davis,* 134 Cal. App.4th at 100 – that NYU's claim that Lisa Blume fraudulently induced NYU to retain Planet Earth predates the services rendered and thus is unrelated to the media services rendered to NYU. (Planet Earth's Petition for Discretionary Review, p. 10.) However, NYU's fraud claim arises from the professional services that Planet Earth provided, or failed to provide, to NYU. In other words, but for the media services that Planet Earth provided, or failed to provide, NYU would not have a cause of action for fraud.[4]

The broad reach of the term "arising out of" precludes coverage of all of NYU's causes of actions under the policy. NYU's three claims against Planet Earth as asserted in its first amended complaint, breach of contract, fraud, and trademark infringement, all arose from Planet Earth providing media services to NYU.

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[4] Planet Earth has cited cases which hold that, within their jurisdictions, there is always an independent duty to warn of a dangerous condition and thus a professional services exclusionary clause will not prevent coverage in those situations. At page 13-14 of its Response to Petition for Review, Gulf pointed out that such an exception is limited to cases of warning of unsafe conditions to third parties. That is not the situation here. Planet Earth filed a statement of additional authority on December 18, 2006 which cited to *S.T. Hudson Engineers, Inc. v. Pennsylvania National Mutual Casualty Co.*, 388 N.J. Super 592, 909 A.2d 1156 (App. 2006), *cert. denied*, 189 N.J. 647, 917 A.2d 787 (2007). Once again, that case also involved the principle that a party has an independent duty to warn of an unsafe condition. Moreover, that case involved a separate policy provision providing for products-completed operations coverage that provided coverage that would have otherwise been excluded by the professional services exclusionary provision. That is not the situation here.

III.
PLANET EARTH DID NOT OBTAIN AN ERRORS AND OMISSIONS INSURANCE POLICY EVEN THOUGH IT WAS AFFORDED THAT OPPORTUNITY.[5]

There is a difference between the coverage afforded under a "Directors and Officers Policy" and that of an "Errors and Omissions Policy." Planet Earth was given the opportunity to obtain an E&O policy from its insurance agent, Jim Miller, but elected to forego purchasing such coverage.

Planet Earth obtained the D&O policy in 1995. The same policy was renewed each subsequent year including the policy year of December 13, 2002 to December 13, 2003 – the policy at issue here. (C.P. 606.) Planet Earth purchased this D&O policy for $3,000. The policy provided $1,000,000 worth of coverage inclusive of defense costs. (C.P. 606.)

Beginning in 1995, Jim Miller, Planet Earth's insurance agent, began advising Planet Earth, and specifically the Blumes, that Planet Earth should obtain professional liability coverage because Planet Earth did not have coverage for claims based upon the professional services it was providing to third parties.

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[5] The trial court ruled that the "extrinsic evidence clearly establishes that the insurer and insured understood, knew, and intended that 'professional services'" would preclude coverage for claims such as this. (C.P. 948-950.) However, the trial court found that the exclusionary clause was unambiguous and that there was no need to rely upon the extrinsic evidence. The court noted that if it were to conclude that the language was ambiguous, the extrinsic evidence would lead to the conclusion that no coverage existed. *Id.*

Mr. Miller advised the Blumes that the D&O policy did not include professional liability coverage. He testified that he specifically informed Planet Earth of that fact:

> Q: At that time, you realized that Planet Earth ran the risk of being sued for its actions arising out of providing these professional services; correct?
>
> A: Correct.
>
> Q: And you knew that they didn't have any policies providing coverage for that risk?
>
> A: Correct.
>
> Q: And so you were telling the Blumes that they had the opportunity to obtain insurance that would cover the risk of being sued for activities arising out of their providing these professional services?
>
> A: Yes.

(C.P. 724-725.)

Indeed, Mr. Miller not only advised them to obtain E&O, but was giving them application forms for such coverage beginning in 1996. (C.P. 501; 504; 511.)

In *Hollingsworth,* 208 Cal. App.3d at 800, the court noted that the insured there was given the opportunity to obtain an errors and omissions policy but choose not to do so:

> There is a well-recognized distinction between "errors and omissions" or

> "professional malpractice" policies and general business liability policies. Calumet [the insured] was well aware of this distinction. The subject of the need for professional liability insurance came up repeatedly during the period of time when Ben Franklin insured Calumet. On numerous occasions Calumet, because of provisions of contracts it entered into with its customers, completed applications for professional services coverage with various insurance companies. On each occasion, apparently because of cost, it declined to purchase that insurance.

Id. at 844. For other examples of situations where an insured elected not to obtain professional errors and omissions coverage, *see also Terre Haute First National Bank v. Pacific Employer Ins.*, 634 N.E.2d 1336, 1339 (Ind. App. 1993)(insured bank, in defending against allegations that it failed to render adequate services to customer, "is seeking defense of a typical errors and omissions claim, a claim not properly brought, and excluded, under the policy at issue in this case"); *State Street Bank and Trust Co.,* 207 Ill. App.3d at 961 (insurance policy at issue was "office building policy" intending to cover losses arising out of building ownership or occupancy and not for damages arising out of providing professional services).

The D&O policy was not a professional errors and omissions policy. By the plain language of the policy it was clear that professional services rendered by Planet Earth were not covered under the policy.

Planet Earth is attempting to have this Court rewrite the policy so that it provides the coverage that it elected not to purchase.

As the court in *National Ben Franklin Ins.*, 60 F. Supp.2d at 841 noted:

> An unambiguous policy must be enforced according to its terms, even those which limit the insurer's liability. Courts may not extend coverage delineated by the policy nor may it rewrite the clear and unambiguous language of the policy.

See also Terre Haute First National Bank, 634 N.E.2d at 1339 ("insurance policies are contracts between private parties; we cannot rewrite the policy nor make a new or different policy, but must enforce the terms of the policy as agreed upon by the parties").

CONCLUSION

There was no ambiguity in this policy: it did not provide coverage for any claim arising from the professional services that Planet Earth was rendering to others. Planet Earth itself admits that NYU retained Planet Earth for media services and that its media services are based upon unique experience and expertise. All of NYU's claims arise out of Planet Earth either providing, or failing to provide, the media services that it promised to provide to NYU. As such, the exclusionary clause applied and Gulf was not obligated to provide a defense to Planet Earth.

The trial court's judgment should be affirmed.

Dated this 11 day of August, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 11th day of August, 2008, she placed with ABC Legal Messengers, Inc. a true and correct copy of the Respondent Gulf Underwriters Insurance Company's Supplemental Brief Re Discretionary Review for hand delivery to counsel of record:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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